

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH E. THANESON,)
) No. CV-11-130-JPH
Plaintiff,)
) ORDER GRANTING DEFENDANT'S
v.) MOTION FOR SUMMARY JUDGMENT
)
MICHAEL J. ASTRUE, Commissioner)
of Social Security,)
)
Defendant.)
)
)
)

BEFORE THE COURT are cross-motions for summary judgment, ECF Nos. 15, 18. Attorney Jeffrey Schwab represents plaintiff; Special Assistant United States Attorney Marc T. Warner represents the Commissioner of Social Security (defendant). The parties have consented to proceed before a magistrate judge, ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** defendant's motion for summary judgment, **ECF No. 18.**

JURISDICTION

Plaintiff applied for disability insurance benefits (DIB) and supplemental security income (SSI) benefits on August 27, 2008, alleging disability beginning May 1, 2008 (Tr. 106-111). The applications were denied initially and on reconsideration (Tr. 68-71, 74-77).

At a hearing before Administrative Law Judge (ALJ) James W. Sherry on December 16, 2009, plaintiff, represented by counsel,

1 and a vocational expert testified (Tr. 24-63). On January 15,
2 2010, the ALJ issued an unfavorable decision (Tr. 9-17). The
3 Appeals Council denied review on February 18, 2011 (Tr. 1-5),
4 making the ALJ's decision the final decision of the Commissioner.
5 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
6 review on April 4, 2011 (ECF Nos. 1, 4).

7 **STATEMENT OF FACTS**

8 The facts have been presented in the administrative hearing
9 transcript, the ALJ's decision, the briefs of the parties, and are
10 very briefly summarized here.

11 Plaintiff was 24 years old at onset and 26 at the hearing.
12 After graduating from high school, she¹ completed three years of
13 college but did not earn a degree (Tr. 28-30, 136, 346). She
14 worked as a dishwasher, cashier, and waitress (Tr. 33-36).
15 Plaintiff alleges she is disabled by mental impairments and
16 obesity. She has not worked for pay since May 1, 2008, but
17 testified she volunteers ten hours a week as an assistant to the
18 ESL teachers at a community college (Tr. 37). Psychotropic
19 medication makes her "pretty slow," which tempts her to stop
20 taking it "so that she does not get fired"; however, plaintiff
21 then becomes manic and is "eventually fired" (Tr. 38). She has
22 been diagnosed with bipolar disorder (manic with psychosis), and
23 gender identification disorder (Tr. 38-39). She is able to lift 20
24 pounds, walk 15 minutes, and stand ten minutes (Tr. 39-40). Even
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26 ¹Plaintiff is a biological female who identifies herself as
27 male (Tr. 193). At the hearing plaintiff indicated she was
28 comfortable being addressed as a female. The feminine pronoun is
used in this opinion.

1 when on medication, plaintiff experiences depression now and then
2 (Tr. 41). She cleans, does laundry, walks, cooks, writes, reads,
3 plays games, and likes being alone. She tires easily and has
4 concentration problems (Tr. 41-46).

5 SEQUENTIAL EVALUATION PROCESS

6 The Social Security Act (the Act) defines disability
7 as the "inability to engage in any substantial gainful activity by
8 reason of any medically determinable physical or mental impairment
9 which can be expected to result in death or which has lasted or
10 can be expected to last for a continuous period of not less than
11 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
12 also provides that a Plaintiff shall be determined to be under a
13 disability only if any impairments are of such severity that a
14 plaintiff is not only unable to do previous work but cannot,
15 considering plaintiff's age, education and work experiences,
16 engage in any other substantial gainful work which exists in the
17 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
18 Thus, the definition of disability consists of both medical and
19 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
20 (9th Cir. 2001).

21 The Commissioner has established a five-step sequential
22 evaluation process for determining whether a person is disabled.
23 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
24 is engaged in substantial gainful activities. If so, benefits are
25 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
26 the decision maker proceeds to step two, which determines whether
27 plaintiff has a medically severe impairment or combination of
28 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

1 If plaintiff does not have a severe impairment or combination
2 of impairments, the disability claim is denied. If the impairment
3 is severe, the evaluation proceeds to the third step, which
4 compares plaintiff's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to
6 preclude substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,
8 App. 1. If the impairment meets or equals one of the listed
9 impairments, plaintiff is conclusively presumed to be disabled.
10 If the impairment is not one conclusively presumed to be
11 disabling, the evaluation proceeds to the fourth step, which
12 determines whether the impairment prevents plaintiff from
13 performing work which was performed in the past. If a plaintiff is
14 able to perform previous work, that Plaintiff is deemed not
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
16 this step, plaintiff's residual functional capacity (RFC)
17 assessment is considered. If plaintiff cannot perform this work,
18 the fifth and final step in the process determines whether
19 plaintiff is able to perform other work in the national economy in
20 view of plaintiff's residual functional capacity, age, education
21 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
22 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon plaintiff to establish
24 a *prima facie* case of entitlement to disability benefits.
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
26 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
27 met once plaintiff establishes that a physical or mental
28 impairment prevents the performance of previous work. *Hoffman v.*

1 *Heckler*, 785 F.3d 1423, 1425 (9th Cir. 1986). The burden then
2 shifts, at step five, to the Commissioner to show that (1)
3 plaintiff can perform other substantial gainful activity and (2) a
4 "significant number of jobs exist in the national economy" which
5 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
6 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

7 STANDARD OF REVIEW

8 Congress has provided a limited scope of judicial review of a
9 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
10 the Commissioner's decision, made through an ALJ, when the
11 determination is not based on legal error and is supported by
12 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
13 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9th Cir. 1999). "The
14 [Commissioner's] determination that a plaintiff is not disabled
15 will be upheld if the findings of fact are supported by
16 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
17 Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is
18 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
19 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
20 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
22 573, 576 (9th Cir. 1988). Substantial evidence "means such
23 evidence as a reasonable mind might accept as adequate to support
24 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
25 (citations omitted). "[S]uch inferences and conclusions as the
26 [Commissioner] may reasonably draw from the evidence" will also be
27 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
28 review, the Court considers the record as a whole, not just the

1 evidence supporting the decision of the Commissioner. *Weetman v.*
2 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
3 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
6 evidence supports more than one rational interpretation, the Court
7 may not substitute its judgment for that of the Commissioner.
8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
9 (9th Cir. 1984). Nevertheless, a decision supported by substantial
10 evidence will still be set aside if the proper legal standards
11 were not applied in weighing the evidence and making the decision.
12 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
13 433 (9th Cir. 1987). Thus, if there is substantial evidence to
14 support the administrative findings, or if there is conflicting
15 evidence that will support a finding of either disability or
16 nondisability, the finding of the Commissioner is conclusive.
17 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

18 ALJ'S FINDINGS

19 ALJ Sherry found plaintiff's DIB coverage lasted through
20 December 31, 2013 (Tr. 9, 11). At step one he found plaintiff did
21 not engage in substantial gainful activity after onset (Tr. 11).
22 At steps two and three, he found she suffers from bipolar
23 disorder, a personality disorder (narcissistic), gender identity
24 disorder, and obesity, impairments that are severe but do not meet
25 or medically equal Listing-level severity (Tr. 11-12). At step
26 four, relying the VE's testimony, the ALJ found plaintiff is able
27 to perform past relevant work as a cashier and dishwasher (Tr.
28 15). Alternatively, at step five, again relying on the VE's

1 testimony, ALJ Sherry found there are other jobs plaintiff can do
2 such as assembler, production inspector/checker, and hand
3 packer/packager (Tr. 16, 54-58). Accordingly, the ALJ found
4 plaintiff was not disabled as defined by the Social Security Act
5 at any time during the relevant period, from onset through the
6 decision dated January 15, 2010 (Tr. 17).

7 **ISSUES**

8 Plaintiff alleges the ALJ improperly credited plaintiff's
9 volunteer work as substantial gainful activity (SGA), failed to
10 credit a therapist's opinion, and asked the VE an incomplete
11 hypothetical, ECF No. 16 at 4-9. The Commissioner responds that
12 the ALJ's decision is supported by substantial evidence and free
13 of legal error. He asks the Court to affirm (ECF No. 19 at 15-16).

14 **DISCUSSION**

15 **A. Volunteer work**

16 Plaintiff first alleges that volunteer work as a teacher's
17 aide is not evidence of the ability to engage in work at SGA
18 levels (ECF No. 16 at 4). The Commissioner responds that the ALJ
19 did not construe plaintiff's volunteer work as evidence she is
20 able work full-time; rather, he relied on it when he determined
21 her complaints of disabling limitations are less than credible
22 (ECF No. 19 at 6-8).

23 Substantial gainful activity is work done for pay or profit
24 that involves significant mental or physical activities. 20 C.F.R.
25 §§ 404.1571-404.1572 & 416.971-416.975. The record shows plaintiff
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1 volunteered as a teacher's aide for ten hours per week².

2 The Commissioner is correct. The ALJ did not find this
3 activity rose to substantial gainful activity levels, nor did he
4 find it constituted an unsuccessful work attempt. Instead, the ALJ
5 found the ability to regularly volunteer, and with increasing
6 responsibilities, was evidence "medication was substantially
7 effective at controlling her mental symptoms," which was
8 inconsistent with Plaintiff's testimony describing severe
9 limitations, and was consistent with her daily activities. The ALJ
10 found that the evidence as a whole undermined plaintiff's
11 subjective complaints, as the Commissioner accurately observes
12 (ECF No. 19 at 6-7, citing Tr. 12, 14).

13 To aid in weighing the conflicting medical evidence, the ALJ
14 evaluated plaintiff's credibility and found her less than fully
15 credible (Tr. 14-15). Credibility determinations bear on
16 evaluations of medical evidence when an ALJ is presented with
17 conflicting medical opinions or inconsistency between a claimant's
18 subjective complaints and diagnosed condition. See *Webb v.*
19 *Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

20 It is the province of the ALJ to make credibility
21 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
22 1995). However, the ALJ's findings must be supported by specific
23 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
24 1990). Once the claimant produces medical evidence of an

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27 Plaintiff began volunteering as an aide in early 2009 (Tr. 420).
28 Prior to that, until September 2008, she volunteered at the
Humane Society. It is unclear when she began (Tr. 14-15, 148,
309-314, 380).

1 underlying medical impairment, the ALJ may not discredit testimony
2 as to the severity of an impairment because it is unsupported by
3 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
4 1998). Absent affirmative evidence of malingering, the ALJ's
5 reasons for rejecting the claimant's testimony must be "clear and
6 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
7 "General findings are insufficient: rather the ALJ must identify
8 what testimony not credible and what evidence undermines the
9 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
10 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

11 The ALJ relied on several factors when he found plaintiff
12 less than fully credible. Some include symptoms effectively
13 controlled with medication, activities inconsistent with allegedly
14 disabling limitations, and a motive for secondary gain (Tr. 12,
15 14-15).

16 Plaintiff's ability to volunteer as a teacher's aide since
17 early 2009, with increasing responsibilities, is evidence she is
18 not as limited as alleged (Tr. 12, 14, Exhibits 12F, 15F).
19 Medications are effective in controlling symptoms when plaintiff
20 takes them as prescribed (Tr. 12, Exhibits 5F, 7F, 12F/27, Tr.
21 426). The ALJ notes in September 2008, plaintiff's partner
22 reported plaintiff engages in normal activities, including going
23 out three to four times per week (Tr. 15, Exhibit 5E at Tr. 152).
24 Plaintiff also reported essentially normal activities, such as
25 attending church weekly and regularly visiting friends and
26 relatives (Tr. 118). With respect to motivation for secondary
27 gain, the ALJ observes plaintiff stated she knew she could lose
28 her chances for getting on social security if she got a job (Tr.

12, 14, 458).

The ALJ's reasons are clear, convincing, and fully supported by the record. See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002)(proper factors include inconsistencies in plaintiff's statements, inconsistencies between statements and conduct, and extent of daily activities). The ALJ's credibility assessment is fully supported by the record and free of legal error.

B. Standards for weighing opinion evidence

In social security proceedings, the claimant must prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.929.

A treating physician's opinion is given special weight because of familiarity with the claimant and the claimant's condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9th Cir. 1989). However, the treating physician's opinion is not "necessarily conclusive as to either a physical condition or the ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)(citations omitted). More weight is given to a treating physician than an examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is given to the opinions of treating and examining physicians than to nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the ALJ may reject an opinion if he states specific, legitimate

1 reasons that are supported by substantial evidence. See *Flaten v.*
2 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
3 1995).

4 In addition to the testimony of a nonexamining medical
5 advisor, the ALJ must have other evidence to support a decision to
6 reject the opinion of a treating physician, such as laboratory
7 test results, contrary reports from examining physicians, and
8 testimony from the claimant that was inconsistent with the
9 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
10 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
11 Cir. 1995).

12 **C. Therapist's opinion**

13 Plaintiff alleges the ALJ should have credited the May 2009
14 opinion of therapist and case manager Allison Nystrom, M.Ed., (ECF
15 No. 16 at 5-7). The Commissioner responds that the ALJ correctly
16 gave germane reasons for rejecting her opinion because, as a
17 therapist, Ms. Nystrom is a not an acceptable source. The germane
18 reasons include the report's internal inconsistencies, the serious
19 limitations were not expected to last twelve months, and the
20 opinion appeared based, at least in part, on plaintiff's
21 unreliable self-report. (ECF No. 19 at 8-14; See C.F.R. §§
22 404.1513, 404.1527, 416.913, 416.927).

23 Ms. Nystrom assessed marked limitations in the ability to (1)
24 understand, remember and follow complex instructions; (2) exercise
25 judgment and make decisions; and (3) respond appropriately to and
26 tolerate the pressures and expectations of a normal work place.
27 She found plaintiff moderately limited in the ability to (1) learn
28 new tasks; (2) relate appropriately to coworkers and supervisors;

1 and (3) care for self, including personal hygiene and appearance
2 (Tr. 437).

3 On the same date, in a concurrent treatment note, Ms. Nystrom
4 states plaintiff is "doing very well with [his] volunteer work at
5 the college and continues to take on more responsibilities in
6 [his] position" (Tr. 464).

7 The ALJ properly rejected the therapist's opinion as
8 internally inconsistent. It is also inconsistent with the treating
9 psychiatrist's reports during the same period (Tr. 307, 454-457).
10 Contradictions between assessed abilities and clinical notes,
11 observations, and other opinions by the same physician provide a
12 clear and convincing reason for not relying on the doctor's
13 opinion. *Bayliss*, 427 F.3d at 1216.

14 Ms. Nystrom opined serious limitations would last six months
15 (Tr. 438), not twelve as required (Tr. 12). And the report appears
16 based, at least in part, on plaintiff's unreliable self-report, as
17 the ALJ points out (Tr. 12, 14-15); see also Tr. 437 (indicating
18 assessed limitations are based on interview and observation).

19 **C. Incomplete hypothetical**

20 Plaintiff alleges the ALJ's hypothetical failed to include
21 all of her limitations.

22 The ALJ is responsible for reviewing the evidence and
23 resolving conflicts or ambiguities in testimony. *Magallanes v.*
24 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
25 trier of fact, not this court, to resolve conflicts in evidence.
26 *Richardson*, 402 U.S. at 400. The court has a limited role in
27 determining whether the ALJ's decision is supported by substantial
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1 evidence and may not substitute its own judgment for that of the
2 ALJ, even if it might justifiably have reached a different result
3 upon de novo review. 42 U.S.C. § 405 (g).

4 The Court finds the ALJ's assessment of the evidence is
5 supported by the record and free of legal error. Plaintiff simply
6 alleges again that the ALJ failed to properly weigh the evidence.

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's conclusions, this
9 court finds that the ALJ's decision is free of legal error and
10 supported by substantial evidence..

11 **IT IS ORDERED:**

12 1. Defendant's Motion for Summary Judgment, **ECF No. 18**, is
13 **GRANTED.**

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
15 **DENIED.**

16 The District Court Executive is directed to file this Order,
17 provide copies to counsel, enter judgment in favor of defendant,
18 and **CLOSE** this file.

19 DATED this 23rd day of August, 2012.

20
21 s/ James P. Hutton
22 JAMES P. HUTTON
23 UNITED STATES MAGISTRATE JUDGE
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